IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.346 OF 1995

Prashant Dnyanraj Thorat — Appellant (Org.Accd.No.1)

Vs.

The State of Maharashtra — Respondent

WITH

CRIMINAL APPEAL NO.420 OF 1995

Vijay Ankush Kakade — Appellant (Org.Accd.No.2)

Vs.

The State of Maharashtra — Respondent

Mr.S.R.Chitnis with Mr.U.R.Agandsurve for appellants in both the appeals.

Mr.D.R.More, APP for State in both the appeals.

CORAM: S.S.PARKAR & ANOOP V.MOHTA,JJ.

April 11, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. These two appeals are filed by original accused nos.1 and 2 respectively in Sessions Case No.474 of 1994 challenging the order of conviction and sentence recorded against them by the Addl. Sessions Judge, Pune on 30th June 1995 convicting both of them for offences under Sections 364-A, 363 and 365 of IPC. While they were sentenced to RI for

life and to pay a fine of Rs.500/- in default RI for 15 days for offence under Section 364-A of IPC, they were sentenced to RI for two years and to pay a fine of Rs.500/- in default RI for 15 days for each of the offences under Sections 363 and 365 of IPC. Since both these appeals arise from the same sessions case in which both the appellants were tried together in respect of the same incident, these two appeals were heard together and are being disposed of by this common judgment.

2. The prosecution case is that one nine year old boy by name Deepak, son of Mohanlal Oswal, PW 1 was kidnapped at about 6.30 p.m. on 7/7/1994 from the garden of their residential society called Adinath where he had gone for playing with his friends. As he did not return upto 8 p.m. that day and despite search was not traceable, the boy's father lodged missing report (Exh.18) at Maharshinagar police chowky under Swargate Police Station, Pune on the same night. Following morning PW 2 Ashok Khivsara, who is married to the sister of Mohanlal, received a telephone call from unknown person at his residence which is also in the same locality or society but in different building enquiring about Mohanlal. The

caller was asked to give ring again after ten minutes. In the mean time PW 2 went to call Mohanlal to receive the telephone but he did not go there as he was unwell. Thereafter again call was received and PW 2 represented that he was Mohanlal i.e. the father of abducted boy Deepak. The person who had given call on the telephone made a demand for a sum of Rs.1,50,000/- as ransom for releasing the boy. On the request of PW 2 the ransom amount was reduced to Rs.1,00,000/- and he was asked to bring the amount between 2 and 2-30 p.m. near Savarkar statue situated near Sarasbaug. The matter was reported to the police who decided to lay a trap for arresting the accused and asked PW 2 to come at the place along with the amount. The panchas were arranged and the trap was laid by the police officers in plain clothes and waited near about that place where the ransom amount had to be paid. PW 2 went to the place at about 2.30 p.m. and parked his scooter and he stood near Savarkar statue. At about 3 p.m. accused no.1 came there on Kinetic Honda scooter, parked his scooter near statue and went to PW 2. PW 2 had given signal by removing the cap. Thereafter the police rushed to the place and apprehended accused no.1 who gave his name as Prashant Thorat, resident of Police

Lines, Swargate. Accused was taken to the police station and in the presence of panchas he volunteered to produce the boy who was kept by him in a room in hotel Natraj. He accompanied police and panchas to the said hotel. Room no.13 was opened with the key which was collected by accused no.1 from the counter. The kidnapped boy Deepak was found inside the room. The police collected the information and checked the register of the hotel in which accused no.1 had hired the room in the name of Samir Akbar Khan after payment of Rs.125/- as deposit and Rs.100/- towards the room rent. That room was having three beds.

3. After arrest of the accused statements of other witnesses including that of kidnapped boy Deepak were recorded. While in custody accused no.1 made a statement on 13th July 1994 that he would show the place from where he had made telephone call asking for ransom. He showed the shop of one Gokuldas Mishra and Kisan Khatri who were running STD booth. Owner of the shop produced the computer memory sheet recording that the call was made in the morning of 8th July 1994 to the telephone number of PW 2 Ashok Khivsara which was attached under panchanama (Exh.35). Accused no.2 was arrested on

26/9/1994. After completion of the investigation charge-sheet was filed and the case was committed to the Sessions Court, Pune.

4. Before the Sessions Court charges were framed for offences under Sections 363, 364-A and 368 simplicitor as well as read with Section 34 of IPC to which both the appellants pleaded not guilty. On behalf of the prosecution eight witnesses have been examined. PW 1 is Mohanlal Oswal, the complainant who is the father of the kidnapped boy. PW 2 is Ashok Khivsara, brother-in-law of the complainant who had received the telephone call demanding ransom. PW 3 is Deepak Oswal, the kidnapped boy. PW 4 is Vishwanath, Manager of hotel Natraj. PW 5 is Kisan Khatri, owner of STD booth. PW 6 is room-boy Ramesh from Natraj hotel. PW 7 is the Investigating Officer PSI Raval and lastly PW 8 is Suresh Matude, who acted as panch. He had also acted as panch when accused no.1 was apprehended when he went to recover the ransom amount. The said witness had, however, turned hostile. The defence of both the accused was of total denial and false implication. Accused no.1 had stated that when he was going to Laxminarayan theatre there was exchange of hot words between him and the

constable and thereafter he took him to the police chowki.

5. After considering the evidence on record the trial Court convicted both the accused and sentenced them as aforesaid by the impugned judgment and order dated 30th June 1995 which is under challenge in these two appeals.

6. Mr.Chitnis appearing for the appellants first contended that there is no evidence on record so far as offence under Section 364-A of IPC is concerned and, therefore, the conviction for the said offence is wrong. He then contended that under the provisions of the Probation of Offenders Act, both the accused being under 21 years of age, ought to have been released on probation rather than convicted for offences under Sections 363 and 365 of IPC if offence under Section 364-A of IPC is not proved.

7. We have gone through the evidence of all the eight witnesses examined by the prosecution and find that there is no evidence to convict the appellants for offence under Section 364-A of IPC for which the sentence imposed by the trial Court is life

imprisonment which is the minimum sentence prescribed under the said provision. For that purpose we also perused the reasoning of the trial Court but do not find any reasons having been given by the trial Court for justifying the conviction of the appellants for the said offence. In order to prove the guilt for offence under Section 364-A what is required to be proved is not only the kidnapping or keeping a person in detention after kidnapping, but in addition it has to be proved that after kidnapping there were threats of death or hurt held out to the person kidnapped or conduct of the accused gives rise to a reasonable apprehension that the said person might be put to death or hurt or hurt or death would be caused to such person in order to compel him to do or abstain from doing any act or to pay a ransom. In this case the prosecution has led the evidence of that boy who was kidnapped from the lawful guardianship without the consent of the parents or without the consent of the guardian of the boy and thereafter he was detained in the hotel room. From the evidence of the witnesses it does not appear that either of the accused had threatened to cause death or hurt to the kidnapped boy Deepak nor did the conduct of the accused give rise to a reasonable apprehension in the

mind of the father of the kidnapped boy that the boy might be put to death or hurt or they would cause him hurt or cause his death. The kidnapped boy Deepak was examined as PW 3. He was hardly 8-9 years old studying in 4th standard. After giving some answers initially the witness was not ready to depose further inspite of the attempt made to make him talk for about 20-25 minutes as noted by the trial Judge and, therefore, ultimately he was discharged with the consent of both the parties. He had not even deposed that he was kidnapped or taken away by these accused or any person. PW 1 Mohanlal, the father of Deepak did not speak to accused no.1 on telephone when the ransom was demanded. He was told about the same by his brother-in-law Ashok, PW 2 that demand was made for a ransom of Rs.1 lakh for the return of Deepak. From his evidence it does not appear that there was any apprehension created in his mind that the boy would be put to death or hurt. What is deposed by PW 2 Ashok Khivsara is that the kidnapper had first asked for a sum of Rs.1,50,000/- for the return of the boy and when he told him that it was not possible to pay that much amount the accused agreed for the payment of Rs.1 lakh. In his deposition he has not stated that any threat was held out or that he had

apprehended that Deepak would be put to death or hurt from the talk he had with the accused. Even the complaint which was lodged after the demand was made for ransom does not mention that any threat was held out or there was apprehension in the mind of the father of the kidnapped boy or his uncle PW 2 Ashok that boy would be put to death or hurt. We are, therefore, of the view that the prosecution has not made out any case for conviction of the appellants for offence under Section 364-A of IPC. The trial Court after concluding that the offences under Sections 363 and 365 of IPC were proved, had simply proceeded to convict the appellants for offence under Section 364-A of IPC and awarded the minimum punishment prescribed under the said provision without considering whether the ingredients of Section 364-A of IPC were proved by the prosecution. In the circumstances, the conviction and sentence for offence under Section 364-A of IPC cannot sustain and is required to be quashed and set aside.

8. Mr.Chitnis appearing for the appellants conceded that he cannot challenge the order of conviction so far as offences under Sections 363 and 365 are concerned as they stand proved by the

evidence on record. He wanted us to record his concession that if this Court comes to the conclusion that the offence under Section 364-A is not made out, he does not wish to challenge the conviction of the appellants for the offences under Sections 363 and 365 of IPC. He, however, submitted that accused no.2 who is appellant in Criminal Appeal No.420 of 1995 may be released on probation as at the time of commission of offence he was below 21 years of age and now after lapse of 11 years he may not be directed to undergo substantive sentence as he is not convicted for any other offence so far. As regards accused no.1 i.e. appellant in Criminal Appeal No.346 of 1995 Mr.Chitnis stated that accused no.1 was convicted for theft of scooter and sentenced to three months' imprisonment. From the record it appears that accused no.1 was in custody through out the period of trial and for about three weeks after the order of conviction. Thus he was in custody for a period of slightly more than one year. Mr.Chitnis, therefore, submitted that since accused no.1 is also settled in life he may not be made to undergo remaining substantive sentence for offences under Sections 363 and 365 of IPC but the substantive sentences may be reduced to already undergone by him

and instead the amount of fine may be increased from Rs.500/- to Rs.5000/- on each count.

9. Though Mr.Chitnis has conceded and did not challenge the conviction of the appellants for offences under Sections 363 and 365 of IPC we have considered the evidence on record in that respect also. After going through the evidence and the reasoning of the trial Court we are also convinced that the prosecution has proved the offence under Sections 363 and 365 of IPC against both the appellants. There is evidence of PW 1 Mohanlal, the father of the kidnapped boy that Deepak was missing since the evening of 7/7/1994 in respect of which he had lodged missing report with the police which is Exhibit 18. He has also deposed about the telephone call received following morning by his brother-in-law Ashok, PW 2 demanding Rs.1 lakh as ransom for the release of his son Deepak which was reported by him to Swargate Police Station and the trap was arranged. His report is produced at Exhibit 19. Then there is evidence of PW 2 Ashok who had received the telephone call from the kidnappers demanding a sum of Rs.1 lakh for release of Deepak. It was this witness who had gone to the place along with the money as per the

demand made by the accused. The police had laid a trap. He reached there on his scooter at 2.30 p.m. and stood near Savarkar statue as directed by the kidnapper. After some time accused no.1 came there on scooter and asked him to hand over the amount to him. Then he gave pre arranged signal to the police and police rushed there and arrested him. He had, however, not fully supported the prosecution. The prosecution had also led the evidence of the manager of the hotel who identified accused no.1. Accused no.1 had initially gone to the said hotel for hiring a room with three beds. Since he was not having Rs.150/- with him he paid Rs.125/- on 7/7/1994. The room-boy led him to room no.13. Then he went out and came back with accused no.2 and the young boy. Next day between 12 and 1 p.m. he made a phone call from the counter of the hotel and accused no.1 as well as the boy talked on the telephone. Thereafter the boy was kept in the room and both the accused went out. Thereafter accused came there along with the police. His evidence is corroborated by PW 6 Ramesh, the room boy. He has deposed that he had shown room no.13 to accused no.1. Thereafter he went out and came along with the boy and another person, accused no.2. Next day police had come to the hotel along with accused

no.1 in the evening when boy was alone in the room.

10. There is also evidence of Kisan Khatri, the owner of the STD booth. PSI Raval PW 7 has deposed that after the arrest on 13th July 1994 accused no.1 made a statement that he would show the place from where he had telephoned the house of PW 2. He led the police and panchas to the shop of PW 5 Kisan Khatri, owner of the STD booth. Then police and panchas along with the accused went to the said shop and PW 5 had produced the computerised memory sheet dated 8th July 1994 showing the call made on the telephone number of PW 2 Ashok. That telephone number is 420563 and the timing is at about 1.34 p.m. The panchanama was made about the statement made by accused no.1 as well as about the accused leading the police and the panchas to the STD booth of PW 5 Khatri where the computerised memory sheet of STD telephone machine was produced. PW 5 Khatri had identified that that call was made by accused no.1. Though the panch PW 8 had turned hostile, there is no reason to discard the evidence of the Investigating Officer PSI Raval and the STD booth owner PW 5 Khatri. Accused no.1 had played the main role in the entire episode while accused no.2 had accompanied

accused no.1 and helped him in the commission of the said offence. Accused no.2 was identified by the hotel manager as well as the room boy from hotel Natraj. Both the accused acted in concert sharing the common intention for the commission of the aforesaid offence. The prosecution has clearly established the offence of kidnapping under Section 363 and the offence of kidnapping with intent to wrongfully confine the boy under Section 365 of IPC.

11. So far as accused no.2 is concerned, Mr.Chitnis submitted that Section 360 of Cr.P.C. or the provisions of the Probation of Offenders Act may be applied to him and he may be released on probation as at the time of commission of the offence he was 20 years old as per the report (Exh.40-A) submitted to the trial Court by the District Probationary Officer. The trial Court in para 23 of the judgment seems to have wrongly mentioned the age of accused no.2 as 22 years. Since accused no.2 was below 21 years of age and the offence committed by him is punishable with maximum sentence upto seven years, he is entitled to be released on probation both under Section 360 of Cr.P.C. as well as under the provisions of the Probation of Offenders Act. Reference may be made

in this connection to the judgment of the Supreme Court in the case of Chandreshwar Sharma v. State of Bihar reported in **(2000) 9 SCC 245**.

12. So far as accused no.1 is concerned, since there is order of previous conviction against him, Mr.Chitnis fairly did not press for releasing him on probation but submitted that because of the passage of time and since accused no.1 is settled in life, the substantive sentence may be reduced to the already undergone by increasing the fine amount to Rs.5000/- on each count.

13. Considering the facts and circumstances of the case and the submissions made on behalf of the accused we are inclined to dispose of these appeals as follows.

14. Criminal Appeal No.346 of 1995 is partly allowed. The conviction and sentence recorded against accused no.1-Prashant Dnyanraj Thorat by the Addl. Sessions Judge, Pune in Sessions Case No.474 of 1994 for offence under Section 364-A of IPC is quashed and set aside. The order of convictions recorded by the trial Court against accused no.1 for

offences under Sections 363 and 365 of IPC is confirmed. However, substantive sentences on both the counts are reduced to the period already undergone but the fine amount is increased from Rs.500/- to Rs.5000/- on each count. In default of payment of fine amount on each count the accused no.1 shall have to undergo sentence of six months' R.I. The amount of fine shall be paid by accused no.1 within a period of four weeks from today in default he shall be liable to be taken into custody for undergoing default sentence.

So far as Criminal Appeal No.420 of 1995 filed by accused no.2-Vijay Ankush Kakade is concerned, the same is also partly allowed. While the order of conviction and sentence recorded by the Addl. Sessions Judge, Pune in Sessions Case No.474 of 1994 for offence under Section 364-A of IPC is quashed and set aside, the order of conviction of accused no.2 for offences under Sections 363 and 365 of IPC is confirmed but instead of sentencing him, he is directed to be released on probation of good conduct by entering into a bond with one surety to appear and receive the sentence when called upon during the period of one year. The bond for a period of one

year shall be executed by him before the trial Court within a period of four weeks from today. The appeal is disposed of accordingly.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)